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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



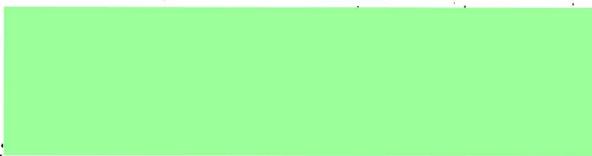
Date: **MAR 12 2013** Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a school district. It seeks to employ the beneficiary permanently in the United States as a speech language pathologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL).

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly. The AAO affirmed the director's decision and dismissed the appeal.

The issue on motion is whether the petitioner has established that the job requires a professional holding an advanced degree such that the beneficiary may be found qualified for classification as an advanced degree professional.

On motion, counsel asserts that the Form I-140 requirement is that the beneficiary has an advanced degree and that the evidence in the record shows that she has such a degree. Counsel further asserts that the Form I-140 is completed based upon qualifications of the beneficiary, not the job or position. Counsel also asserts that the Form I-140 instructions indicate that the petitioner checked the box based upon the best description of the category of the person for whom the petition is being submitted. Contrary to counsel's claims, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is a Bachelor of Science degree in speech and language impairments. It is the job requirements of the ETA Form 9089 which drive the proper category for which to seek classification. 8 C.F.R. § 204.5(k)(4). The beneficiary must then meet the requirements of the labor certification by the priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Accordingly, the job offer portion of the ETA Form 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability. However, the petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability on the Form I-140. Although counsel claims that there is no discrepancy in that the beneficiary holds an advanced degree, the petitioner did not list such a requirement on the ETA Form 9089. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to do so. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Counsel further asserts on motion that USCIS violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. Counsel contends that USCIS could have requested additional information from the petitioner or that it could have issued a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) based upon the discrepancy in the boxes checked on the ETA Form 9089 and Form I-140, respectively. Counsel asserts that the request would have allowed the petitioner an opportunity to correct Part 2 of Form I-140 and to select the correct box (e), allowing the petitioner to cure the deficiency. Contrary to counsel's contentions, the cited regulation permits the director to deny petitions when the evidence does not demonstrate eligibility. *Id.* In this matter, as the accompanying labor certification indicates that the job does not require an advanced degree professional, the director correctly denied the petition without first requesting additional evidence.

The minimum requirement found in the ETA Form 9089 falls below the minimum permitted for an advanced degree professional. 8 C.F.R. § 204.5(k)(2). To the extent the petitioner is requesting a change to the professional category; a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi* at 176.

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the motion must be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The AAO's prior decision, dated April 20, 2012, is affirmed. The petition remains denied.